

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2014-002626

Duston Lenier Rogers, #279924,Respondent-Petitioner,

v.

State of South Carolina,Petitioner-Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

Duston Lenier Rogers ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted at the November 2006 term of the Cherokee County Grand Jury for one count of possession with intent to distribute crack cocaine (06-GS-11-0964) and one count of unlawful possession of a pistol (06-GS-11-0965). Petitioner was represented by Edward Lamb, Esquire. On April 4, 2007, Petitioner proceeded to trial and was found guilty as indicted. The Honorable J. Derham Cole sentenced him to confinement for concurrent terms of 15 years for possession with intent to distribute crack cocaine – 3rd offense (06-11-0964) and one year for unlawful possession of a pistol (06-GS-11-0965).

A timely Notice of Appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals dismissed the case by written order filed March 10, 2009. State v. Rogers, 2009-UP-136 (S.C. C.t. App. filed March 10, 2009). The case was returned to the lower court by Remittitur dated March 26, 2009.

Petitioner filed his first application for post-conviction relief (PCR) on August 24, 2009. The State made its return on February 19, 2010, and an evidentiary hearing into the matter was convened on May 24, 2010. Petitioner was present and represented by Stanley T. Case, Esquire. In that PCR action, Petitioner alleged that counsel was ineffective for failing to object to the sentencing enhancement.

The Honorable J. Mark Hayes, II, denied and dismissed Petitioner's application with prejudice by written Order dated July 28, 2010. A timely Petition for Writ of Certiorari was submitted to the South Carolina Supreme Court. The appeal was then transferred to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied the Petition by Written Order dated March 7, 2013. The Remittitur was issued March 25, 2013.

In his second PCR application, filed October 26, 2012, Petitioner alleged the following: (a) "Newly discovered evidence of juror misconduct and impartial jury" and (b) "Evidence of material facts not previously presented and heard that requires vacation of conviction and sentence." The facts Petitioner provided to support each of these grounds in his application were: (a) "Denial of Due Process and fundamental fairness" and (b) "Newly and after discovered evidence."

Leah Moody, Esquire, was appointed to represent Petitioner on his second PCR application. App. p. 168, lines 15–18. Respondent then filed a Motion for a More Definite Statement. App. p. 168, lines 13–18. After receiving no response to the Motion, Respondent subsequently filed its Return and Motion to Dismiss on May 2, 2014, on grounds that Petitioner's second application was successive, that it was filed beyond the expiration of the statute of limitations, and that pursuant to 12(b)(6), SCRPC, he failed to state a claim for which relief could be granted because he failed to allege any facts whatsoever in support of his claim of juror misconduct.

A hearing was held before the Honorable Roger L. Couch on Respondent's Motion to Dismiss on the issue of Petitioner's failure to allege specific facts in support of his allegation of juror misconduct. App. p. 168, lines 19–23. At the hearing, Judge Couch continued the case for 30 days to permit Petitioner's counsel to file an amended application specifically setting forth the factual allegations of juror misconduct. App. p. 171, lines 8–13. Petitioner failed to file an amended PCR application. Accordingly, in an Order filed November 26, 2014, Judge Couch granted Respondent's Motion to Dismiss. App. pp. 173–178.

ISSUE PRESENTED

Should this Court affirm the PCR court's dismissal of Petitioner's successive PCR application on the grounds that it was successive and Petitioner failed to state a claim upon which relief could be granted where Petitioner was given two separate opportunities to amend the application to set forth facts in support of his allegation of juror misconduct but failed to do so.

STANDARD OF REVIEW

In reviewing the propriety of a dismissal, this Court must assume facts presented by the applicant are true and view them in the light most favorable to the applicant. Leamon v. State, 363 S.C. 432, 434-35, 611 S.E.2d 494, 495 (2005).

ARGUMENT

The "[s]ummary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." Pelzer v. State, 378 S.C. 516, 518, 662 S.E.2d 618, 619 (Ct. App. 2008) (citing S.C. Code Ann. § 17-27-70(b)-(c) (2003)). As in any other civil action, in considering a motion to dismiss, "where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant." McCoy v. State, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013) (citing Leamon, 363 S.C. at 434, 611 S.E.2d at 495). Where an applicant "alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court," such allegations give rise to a question of fact which must be resolved by a hearing. Id. (citing Delaney v. State, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977)).

An application for post-conviction relief must be summarily dismissed when it is successive to a previous application for PCR. S.C. Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant . . . must be raised in his original, supplemental or amended application. Any ground . . . not so raised, . . . in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Successive applications are disfavored and the burden is on an applicant to establish that any new ground raised in a subsequent application could not have been raised in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

The PCR judge correctly dismissed Petitioner's application as successive pursuant to S.C. Code Ann. § 17-27-90 because Petitioner failed to establish that he could not have raised the allegation in a previous application.

To establish a claim of juror misconduct, an applicant must show (1) that the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." McCoy, 401 S.C. at 369, 737 S.E.2d at 626. However, because PCR is a civil action, as a threshold matter, an applicant must first establish that he is entitled to an evidentiary hearing on such claim. See Id.

The Uniform Post-Conviction Procedure Act requires that an applicant "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1976). Additionally, claims may be dismissed pursuant to Rule 12(b)(6) where a pleading lacks facts sufficient to state a claim for relief. In an application for PCR, "it is incumbent upon the applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held." Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965). Rule 8(a), SCRCP, provides that a pleading must contain: "(1) a short and plain statement of the *facts* showing that the pleader is entitled to relief. . ." (emphasis added).

The PCR judge and Respondent gave Petitioner two opportunities to amend his application to set forth allegations of PCR. First, Respondent made a motion for a more definite statement that went unanswered. Second, the PCR judge had a hearing to determine whether

Petitioner alleged any facts giving rise to a question of fact that would entitle him to an evidentiary hearing on the issue of newly discovered evidence in the form of juror misconduct. At the hearing on the State's motion to dismiss, September 17, 2014, the PCR court provided Petitioner with a period of 30 days in which to amend his application and provide specific grounds on which his allegations were based. Petitioner failed entirely to provide any specific grounds.

Petitioner, though given ample opportunity, failed to set forth any facts that would entitle him to relief and has failed to make the minimum prima facie showing. Rather, Petitioner wholly failed to allege facts with any specificity or any factual matter whatsoever. He merely stated as a ground for relief "newly discovered evidence of juror misconduct." Therefore, this Court should affirm the PCR court's dismissal of Petitioner's claim for newly discovered evidence in the form of juror misconduct pursuant to the Uniform Post-Conviction Procedure Act and for failing to state a claim for which relief can be granted pursuant to Rule 12(b)(6), SCRCP.

The PCR judge was under no obligation to allow Petitioner to testify at the hearing on Respondent's motion to dismiss, which was not an evidentiary hearing, and Petitioner fails to refer to any authority to the contrary. Accordingly, the PCR judge did not err when he did not permit Petitioner to testify at the hearing and Respondent submits this argument is not properly preserved for review.

Therefore, this Court should affirm the PCR court's dismissal of Petitioner's application absent a hearing because Petitioner failed to state a claim upon which relief could be granted pursuant to Rule 12(b)(6), SCRCP, and failed to establish any reason the application should not be dismissed as successive.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

October 1, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County
The Honorable Roger L. Couch, Circuit Court Judge

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DUSTON LENIER ROGERS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

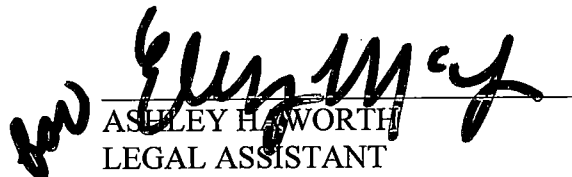
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
SC Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

This 7th day of October, 2015.


ASHLEY HARWORTH
LEGAL ASSISTANT